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No. 81-2160

In the Supreme Court of the United States

OCTOBER TERM, 1981

ANA ERIKA AGRILLO-LADLAD and
LAWRENCE J. FLEMING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to show that, as used in the circumstances of this case, naphtha constituted an "explosive" within the meaning of 18 U.S.C. 844(j).

2. Whether the jury was properly instructed on the meaning of "incendiary device" under 18 U.S.C. 844(j).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1982. The petition for a writ of certiorari was filed on May 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiring to damage and destroy a building by means of an explosive, in violation of 18

U.S.C. 371, and of damaging and destroying a building by means of an explosive, in violation of 18 U.S.C. 844(i). Petitioner Agrillo-Ladlad was sentenced to four years' imprisonment on each conviction, the sentences to run concurrently. Petitioner Fleming was sentenced to two years' imprisonment and a consecutive term of three years' probation. The court of appeals affirmed (Pet. App. A1-A19).

The evidence at trial established that Agrillo-Ladlad owned a commercial printing company, United Latino's Press, which occupied half of the sixth floor of a building in Chicago, Illinois. Fleming was the shop manager of the printing company; Jeffrey Bennett was also employed by United Latino's Press (Tr. 219, 1504, 1580). The three agreed to destroy the premises occupied by the company in order to collect the proceeds of the fire and casualty insurance covering the business. Bennett was to execute the first step of the plan by destroying the premises with naphtha benzine (Tr. 244-251).

As planned, Bennett disconnected the printing firm's alarm and sprinkler system, and then laid layers of newspapers in rows to form "trailers" connecting the major pieces of equipment to a central ignition point (Tr. 302-312). The temperature of the premises at the time was between 55 and 60 degrees Fahrenheit (Tr. 1043). Bennett poured naphtha on the trailers from a 55-gallon drum (Tr. 308-310).

Bennett intended to ignite the trailers with an electronic ignition unit connected to a timing device (Tr. 312). But naphtha that Bennett had inadvertently spilled on his pants caught fire. Although he managed to extinguish the fire, he burned his hands and legs (Tr. 348-350). Consequently, Bennett simply dropped a burning piece of paper on the juncture of three of the trailers and left the

premises. The doors and windows were closed when Bennett left (Tr. 353).

Within fifteen minutes the Chicago Fire Department responded to the fire, and an engineer observed that the windows of the printing company had been blown out and flames were emanating from them (Tr. 46-47). After entering the premises the engineer observed "almost total destruction * * * pipes bent, windows charred and blown out." The office equipment was warped and twisted; a chandelier on the floor above was almost completely melted (Tr. 53).

Inspector Thomas Kerner of the Chicago Bomb and Arson Squad found evidence of intense heat. Kerner concluded that an accelerant had been spread in the area, that the vapors from the accelerant had been contained by the heat of the room or humidity, and that the vapors had been simultaneously ignited in an "explosive-type fire of rapid oxidation" (Tr. 108, 111, 127).

Thomas Cousins, an enforcement officer of the Bureau of Alcohol, Tobacco and Firearms, testified as an expert for the government. He said that the accelerant used by Bennett (naphtha) as well as the accelerant that Fleming had brought to the office for use in the fire (gasoline) were potential explosives (Tr. 975). He concluded that an uncontained explosion in the form of a simultaneous ignition of the vapor envelope above the naphtha-soaked trailers had taken place (Tr. 984-985). Cousins said that either a contained explosion caused by ignition of the naphtha vapor that had built up in the office took place blowing out the windows, or the explosion was caused by the natural phenomena of heat building up in an uncontained flash fire, causing a "flash over" blowing out the windows and venting the fires (Tr. 1020).

Cousins explained that both naphtha and gasoline are potentially explosive at temperatures above their respec-

tive "flash points" of 50° Fahrenheit and minus 45° Fahrenheit (Tr. 979). A "flash point" is the temperature at which such liquid substances give off sufficient vapors to ignite but only at the point of ignition. At temperatures above the flash point sufficient vapors may be generated and mixed with air that a flame will be propagated throughout the vapor-air mix when ignited (Tr. 978). The explosive range (Tr. 979) of a liquid like naphtha is that range of proportions of vapor to air in which a flame will be propagated simultaneously throughout the vapor-air mixture ("vapor envelope") away from the primary source of ignition (Tr. 979). If the explosive range is reached and there is ignition, "there will be an explosion," Mr. Cousins testified (Tr. 983-985). He explained that the explosive phenomenon of high explosives and vapor-air mixtures is measured in the same way—by the rate of progression of fire throughout the material (Tr. 985). Thus, he concluded that the pictures of the fire scenes depicted the aftermath of an explosive phenomena.

Mr. Cousins further concluded that the system of naphtha soaked newspaper trailers directing fire to the equipment, in combination with either the mechanical means contemplated or the manual means actually used by Bennett for ignition, constituted an incendiary device (Tr. 975, 989). He listed the characteristics of this incendiary device as a group of components designed to spread and direct fire, with a source of ignition and no industrial application. "Its only function would be to—burn property" (Tr. 989).

ARGUMENT

1. Petitioners contend (Pet. 9-15) that United Latino's Press was not damaged by an "explosive" as defined in 18 U.S.C. 844(j). For reasons well stated in the opinion of the court of appeals, upon which we rely, that contention is without merit.

The statutory definition of "explosive" is set forth in 18 U.S.C. 844(j), which provides, in relevant part, that "the term 'explosive' means * * * any chemical compound[ ], mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire * * * of the compound, mixture, or device or any part thereof may cause an explosion." The court of appeals correctly concluded that, as used here, naphtha is well within the plain language of that definition (Pet. App. A6):

> The device used by [petitioners] contained an "oxidizing" unit, the air in [the premises]. The device contained a "combustible" unit, the naphtha vapors, trailers of newspapers, and a rolled newspaper. The "quantities" of the oxidizing unit and combustible unit caused an "explosion" when Bennett ignited the device "by fire."

The court's conclusion that petitioners used an "explosive" is reinforced by the history of 18 U.S.C. 844(j). As set out in some detail by the court, the legislative history shows that Congress purposely adopted an expansive definition of "explosive," with the knowledge that it would include highly flammable substances like gasoline and naphtha (see Pet. App. A9-A15). Accord, *United States* v. *Poulos*, 667 F.2d 939 (10th Cir. 1982); *United States* v. *Hepp*, 656 F.2d 350 (8th Cir. 1981); see also *United States* v. *Hewitt*, 663 F.2d 1381 (11th Cir. 1981).[1]

Contrary to petitioners' contention (Pet. 7-9), the decision in this case does not conflict with *United States* v. *Gere*, 662 F.2d 1291 (9th Cir. 1981). In *Gere* the only

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[1] The jury surely could have found that the naphtha compound used to destroy United Latino's Press in fact caused an explosion.

description of the means used to destroy the property is as follows (662 F.2d at 1292; Pet. App. B2):

> Firemen and investigators determined from marks on the floor, burn patterns in wood and other materials, and the loci of the fires within the warehouse that the fire had been "set" for delayed ignition from outside the cargo door of the building with the use of "trailers" of photocopier fluid and fluid-soaked materials. The "trailers" were in effect fuses running from the point of ignition into the warehouse.

The only element of the Section 844(j) definition of "explosive" even mentioned by the Ninth Circuit (662 F.2d at 1295-1296; Pet. App. B10) is that part which incorporates 18 U.S.C. 232(5).[2] Although the court's opinion contains some broad language, the court's holding provides no support for petitioners.[3] At most, the court held that the vaguely described means of destruction involved in that case did not constitute an "explosive or incendiary device" within the meaning of 18 U.S.C. 232(5). Nothing in *Gere* suggests that destruction of a building by igniting a mixture of naphtha vapor and air is outside the scope of Section 844(i), especially when, as here, the ignition pro-

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[2] 18 U.S.C. 232(5) is set out at Pet. 3.

[3] The Ninth Circuit's statement (662 F.2d at 1296; Pet. App. B10) that "[t]here is no indication that [18 U.S.C. 844(i)] was meant to overlap state arson law relating to buildings in interstate commerce" is demonstrably incorrect. See, *e.g.*, *Explosives Control: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 38, 60, 69, 76-77, 100 (1970); see also H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 39, 70 (1970). Indeed, it is manifest that fire will frequently result from the use of even high explosives that are indisputably within the scope of Section 844(i) and (j).

duces an explosion.[4] The Ninth Circuit panel in *Gere* simply had no occasion to address the issue presented in this case.

2. Petitioners also complain (Pet. 15-18) that the district court improperly instructed the jury on the meaning of the term "incendiary device" as used in 18 U.S.C. 844(j). The district court gave the following instructions (Gov't Inst. Nos. 36 and 38; O.R. 79):

> The term "explosive" means: (1) an incendiary device; or (2) any chemical compound, mechanical mixture or device that contains any combustible units or other ingredients in such proportions, quantities or packing that ignition by fire of the compound mixture or device or any part thereof may cause an explosion.
>
> * * * * *
>
> The term "incendiary device" mean[s] any incendiary bomb or grenade, fire bomb or similar device. Any article or device composed of a combustible material capable of producing sufficient heat to destroy property of any kind and having components designed to ignite that combustible material is under the laws an incendiary device similar to a fire or incendiary bomb or grenade.

These instructions substantially track the language of the statute. In *United States* v. *Birchfield*, 486 F.Supp. 137, 139 (M.D. Tenn. 1980), the court observed that 18 U.S.C. 232(5) contemplates "a separation of identity between the

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[4] In *United States* v. *Cutler*, No. 81-1366 (9th Cir. May 10, 1982), petition for rehearing pending, the court extended *Gere* to a case involving the ignition of a mixture of gasoline vapor and air. Without discussion, the panel found *Gere* sufficient to invalidate a stipulation that an "explosive" had been used. Although the sentence on the Section 844(i) conviction was concurrent with those on several other convictions that were affirmed, the *Cutler* panel reversed the Section 844(i) conviction and remanded for a new trial.

means of destruction (an explosive) and the object of destruction (a building)." That observation is of no consequence here. The jury instructions in this case plainly contemplate an incendiary device separate from United Latino's Press. Furthermore, petitioners suggest no basis for "[t]he concept of unity or portability" (Pet. 17) in the language of the statute.

Accordingly, there is no merit to petitioners' challenge to the district court's instructions to the jury on this issue. See Pet. App. A18-A19; *United States* v. *Peterson*, 475 F.2d 806, 812 (9th Cir. 1973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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